

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**T.L., Appellant**

**and**

**U.S. POSTAL SERVICE, PROCESSING &  
DISTRIBUTION CENTER, New Orleans, LA,  
Employer**

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**Docket No. 20-0978  
Issued: August 2, 2021**

*Appearances:*

*Vatroslav Jacob Garbin, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 3, 2020 appellant, through counsel, filed a timely appeal from a November 26, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the November 26, 2019 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability from work for the period September 4 through 14, 2018 causally related to his accepted cervical conditions.

## **FACTUAL HISTORY**

On October 26, 2013 appellant, then a 59-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he developed neck pain due to factors of his federal employment, specifically repetitive twisting, bending, and standing. He noted that he first became aware of his claimed condition on July 6, 2012 and realized its relationship to his federal employment on October 26, 2013. Appellant did not stop work. OWCP accepted his claim for neck sprain and subsequently expanded the acceptance of his claim to include displacement of cervical intervertebral disc without myelopathy. On September 29, 2015 appellant underwent OWCP-authorized cervical discectomy and fusion at C3-4 and stopped work. OWCP paid him wage-loss compensation on the supplemental rolls as of September 29, 2015 and on the periodic rolls, as of December 13, 2015.

In a March 24, 2016 progress note, Dr. Joseph B. Boucree, Jr., a Board-certified orthopedic surgeon, recounted appellant's continued improvement of neck and radicular arm pain following surgery. He conducted a physical examination and indicated that appellant could return to work with restrictions of avoiding excessive bending, twisting, lifting, and pushing greater than 15 pounds. Dr. Boucree completed a work capacity evaluation (Form OWCP-5c), which indicated that appellant could work with restrictions of reaching above the shoulder for four hours and pushing and pulling for three hours.

Appellant returned to full-time, modified-duty work on May 24, 2016 and to full-duty work on August 4, 2016.

Appellant continued to receive medical treatment. A September 7, 2018 cervical spine magnetic resonance imaging (MRI) scan revealed increased mild-to-moderate central canal stenosis and moderate foraminal narrowing at C4-5, mild central canal stenosis and foraminal narrowing at C5-6, moderate left foraminal narrowing at C2-3, and prior instrumented anterior cervical fusion at C3-4 with mild left foraminal narrowing.

In a September 7, 2018 progress note, Dr. Boucree indicated that appellant was seen for follow up of status post anterior cervical discectomy and fusion at C3-4 surgery. He indicated that appellant had informed him that several weeks prior, while at work, he began to experience increased neck pain and recurrence of radicular pain extending into his upper extremities. Upon physical examination, Dr. Boucree observed moderate restriction of the cervical spine secondary to pain and diminished sensation to light touch and pinprick at the bilateral C5 dermatomes of the upper extremities. He diagnosed status post anterior cervical discectomy and fusion at C3-4 with transitional junctional disease with cervical instability C4-5 and C5-6, resultant cervical myeloradiculopathy. Dr. Boucree recommended that appellant undergo anterior cervical discectomy and fusion at C4-5 and C5-6.

In a September 7, 2018 work excuse note, Dr. Boucree requested that appellant be excused from work for one month.

In a separate September 7, 2018 work excuse note, Dr. Boucree indicated that appellant was unable to work at this time and noted that appellant was temporarily incapacitated pending surgical intervention.

On September 24, 2018 appellant filed a claim for compensation (Form CA-7) for disability from work for the period September 4 through 14, 2018. In an attached time analysis (Form CA-7a), he claimed that he used eight hours of leave without pay (LWOP) each on September 4, 5, 6, 7, 8, 11, 12, 13, and 14, 2018. Appellant noted that his reason for leave use was “incapacitated.”

In a September 27, 2018 report, Dr. Kenechukwu Ugokwe, a Board-certified neurological surgeon serving as an OWCP district medical adviser (DMA), indicated that he had reviewed Dr. Boucree’s September 7, 2018 report and agreed that appellant’s current neck condition was causally related to his work injury as appellant did not have neck pain prior to the work injury. He also explained that the proposed anterior cervical discectomy and fusion at C4-5 and C5-6 surgery was causally related to appellant’s accepted condition of displacement of cervical intervertebral disc without myelopathy. The DMA further noted that he disagreed with Dr. Boucree’s recommendation that the proposed surgery was medically necessary because diagnostic testing did not show significant stenosis at those levels.

In an October 3, 2018 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish a recurrence of disability commencing September 4, 2018. It advised him of the type of additional evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to provide the necessary evidence.

OWCP received a September 7, 2018 office visit note and work excuse note from Dr. Boucree. Dr. Boucree checked a box indicating that appellant was unable to return to work. He indicated that appellant was incapacitated pending surgical intervention and recovery from September 7, 2018 through February 7, 2019.

In an October 12, 2018 duty status report (Form CA-17), Dr. Boucree noted a diagnosis of cervical strain and checked a box marked “No” indicating that appellant was unable to resume work.

By decision dated November 13, 2018, OWCP denied appellant’s claim for a recurrence of disability September 4 through 14, 2018. It found that the medical evidence of record was insufficient to establish disability from work during the claimed period due to his accepted cervical conditions.

Appellant subsequently submitted additional medical evidence, including hospital records and chart notes dated October 4, 2018.

In progress notes dated October 12, November 15, and December 14, 2018, Dr. Boucree indicated that appellant was post-anterior cervical discectomy and fusion at C4-5 and C5-6 on October 1, 2018. He provided examination findings and noted that appellant’s neck and radicular arm pain were improving. Dr. Boucree also completed CA-17 forms dated October 12, 2018 through July 3, 2019 and checked a box marked “No” indicating that appellant was unable to resume work.

Appellant submitted a February 1, 2019 letter from Dr. Boucree. Dr. Boucree indicated that he had reviewed Dr. Ugokwe's September 27, 2018 DMA report and disagreed with his conclusion that the proposed cervical surgery was not medically necessary. He asserted that the September 7, 2018 cervical spine MRI scan had demonstrated mild-to-moderate canal stenosis and moderate foraminal stenosis at C4-5 and C5-6. Dr. Boucree also indicated that physical examination abnormalities were consistent with the MRI scan. He concluded that the proposed cervical discectomy and fusion at C4-5 and C5-6 were necessary to improve appellant's neck pain and upper extremity radicular pain and to stop the progression of appellant's myelopathy.

On August 13, 2019 appellant, through counsel, requested reconsideration.

In a September 28, 2019 Form OWCP-5c, Dr. Boucree checked a box indicating that appellant could work full time with restrictions of pushing, pulling, and lifting up to 10 to 15 pounds.

By decision dated November 26, 2019, OWCP denied modification of its prior decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.<sup>6</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>7</sup>

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position, or the medical evidence establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden of proof, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.<sup>8</sup> This burden of proof includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history that, for each period of

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> See *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>7</sup> See *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

<sup>8</sup> *S.F.*, Docket No. 19-1735 (issued March 12, 2020); *J.B.*, Docket Nos. 18-1752, 19-0792 (issued May 6, 2019); *C.G.*, Docket No. 16-1503 (issued May 17, 2017); *Terry R. Hedman*, 38 ECAB 222 (1986).

disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.<sup>9</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>10</sup>

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the specific employment factors identified by the claimant.<sup>11</sup>

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.<sup>12</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

In support of his disability claim, appellant submitted a series of reports, work status notes, and CA-17 form reports from Dr. Boucree. In a progress note and work excuse notes dated September 7, 2018, Dr. Boucree noted examination findings of moderate restriction of the cervical spine secondary to pain and diagnosed status post anterior cervical discectomy and fusion at C3-4 with transitional junctional disease with cervical instability C4-5 and C5-6, resultant cervical myeloradiculopathy. He indicated that appellant was unable to work from September 7, 2018 through February 7, 2019 and explained that appellant was incapacitated pending surgical intervention and recovery. Dr. Boucree continued to treat appellant and submitted progress notes, CA-17 form reports, and OWCP-5c forms dated October 12, 2018 through July 3, 2019 indicating that appellant was unable to work.

The Board finds that, while the reports from Dr. Boucree are not completely rationalized, they are consistent in indicating that appellant was unable to work modified duty, beginning September 7, 2018, due to continued cervical symptoms and abnormal examination findings.<sup>13</sup> Accordingly, they are sufficient to require OWCP to further develop the medical evidence.<sup>14</sup>

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<sup>9</sup> *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

<sup>10</sup> *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

<sup>11</sup> *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

<sup>12</sup> See *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>13</sup> See *R.R.*, Docket No. 20-1338 (issued April 16, 2021); *D.G.*, Docket No. 18-0043 (issued May 7, 2019); *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

<sup>14</sup> See *A.R.*, Docket No. 20-0057 (issued April 7, 2021); *J.S.*, Docket No. 19-0892 (issued November 4, 2020).

It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>15</sup> OWCP has an obligation to see that justice is done.<sup>16</sup>

The case will therefore be remanded to OWCP for further development of the medical evidence. On remand OWCP shall prepare a statement of accepted facts (SOAF) and refer the matter to a specialist in the appropriate field of medicine, consistent with OWCP's procedures, to determine whether appellant's disability from work for the period September 4 through 14, 2018 was causally related to his accepted cervical conditions.<sup>17</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>15</sup> See e.g., *M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769, 770-71.

<sup>16</sup> See *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

<sup>17</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation of Medical Evidence*, Chapter 2.810.9.b(1) (June 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 26, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 2, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board